

4. According to De Bode, when she arrived at the Courthouse she saw that there were many people lined up both inside and outside the building, waiting to register and to vote. She was unable to locate the poll watcher who had requested food, so she decided to offer sandwiches to some of the people who were standing in line. De Bode removed from the sandwich tray a clear plastic cover (which did not have any political messages or markings on it) and offered the sandwiches to people standing in line. No one recalls De Bode making any statements while distributing the sandwiches that could be construed as an attempt to solicit votes. In addition, De Bode did not identify herself as a member of the Democratic Party.

5. De Bode recalls that several minutes before 8 pm people who had been standing in line outside the building were brought inside. An election official announced that everyone who was standing in line would be permitted to vote that evening, even though the polls normally close at 8 pm. After De Bode had distributed all the sandwiches on the tray, she believed that some people who had not received sandwiches appeared to be disappointed. De Bode approached Shelly Vance and Jennifer Blossum and asked whether she could obtain more sandwiches and return to distribute them. Vance and Blossum gave her permission to do so.

6. Both Vance and Blossum assert that when they first spoke with De Bode they did not know she was affiliated with the Democratic Party. They also agree that when De Bode first handed out sandwiches to voters no one reported that De Bode did or said anything that could be construed as solicitation of votes.

7. De Bode returned to Democratic Party headquarters and described the situation at the Gallatin County Courthouse. De Bode was given a tray of sandwiches with a plastic lid that had two stickers stating: "Jon Tester U.S. Senate, testerforsenate.com." Jon Tester was a candidate for the U.S. Senate in 2006, and his name was on the ballot in November, 2006.

8. While at Democratic Party headquarters, De Bode was joined by Jim Walseth, Chairman of the local Democratic Central Committee. Walseth agreed to accompany De Bode back to the Gallatin County Courthouse, and he brought along a box containing bottles of water. Walseth recalls seeing the Jon Tester stickers on the plastic lid to the tray of sandwiches. In his written response to the complaint, Walseth described the Tester stickers as a "tractable problem," meaning that the lid could easily be removed.

He considered removing the lid with the stickers, but he did not to do so. De Bode contends she did not notice the Jon Tester stickers on the plastic lid until later, when she was walking up the steps of the courthouse. She explains her failure to remove the lid with the Tester stickers by noting that she and Walseth were engaged in what she described as a spur of the moment effort to help out in a bad situation (distributing food and water to voters). Both Walseth and De Bode contend their thoughts were focused on providing assistance to the voters who had been waiting in line for a long time. They considered their efforts to be “humanitarian” in nature. Neither Walseth nor De Bode removed the lid from the sandwich tray prior to entering the courthouse.

9. Walseth and De Bode entered the courthouse with the sandwiches and bottled water. They were immediately confronted by election officials in the entryway of the building, where the sandwich tray lid was “confiscated” by the officials because of the Tester stickers. The lid was placed on top of a column, face down so that no one could read the stickers. Walseth and De Bode were then permitted to enter the main area of the courthouse to distribute the sandwiches and bottled water. Walseth asserts that he also removed from his hat a button that stated “Truebluedemocrat” prior to entering the main area of the courthouse.

10. Vance and Blossum agree they confiscated the plastic lid with the John Tester stickers in the entryway. Vance took possession of the plastic lid and then confronted Walseth and De Bode while they were handing out sandwiches and water. According to Walseth and De Bode, Vance loudly berated them for bringing the sandwich tray containing the Tester stickers into the courthouse.

11. At the request of Vance, Mary Ellen Fitzgerald took some photographs, including photos of the sandwich tray lid and of Walseth and De Bode distributing food and water. De Bode contends that when Vance confronted them she physically grabbed her and Walseth and turned them 180 degrees to face the camera, and that Vance thrust the sandwich tray lid into De Bode’s hands and had Fitzgerald take a photo. In addition, according to both De Bode and Walseth, Vance stated in a loud voice, “See what the Democratic Party is doing” or something similar.

12. De Bode and Walseth were permitted to distribute their remaining sandwiches and bottles of water, and then left the building.

13. Vance and Blossum claim that Walseth and De Bode were ignoring them and refusing to acknowledge that they had intentionally brought the sandwich tray lid with the Tester stickers into the courthouse. They believe that Walseth and De Bode were clearly attempting to influence persons to vote for Jon Tester by offering food and drink.

14. Walseth and De Bode deny they were attempting to influence the voters. They contend they were simply trying to help out by distributing food and water to people who had been waiting a long time to register and to vote. Walseth contends that the only reason the voters became aware of the plastic lid with the Tester stickers was because of the actions of Vance in loudly confronting them and having photographs taken in front of the voters. He contends that had Vance and Blossum simply quietly confiscated the sandwich tray lid in the entryway and taken no further action, none of the voters standing in line would have even been aware of the Tester stickers.

15. Vance and Blossum filed this complaint alleging that De Bode and Walseth violated § 13-35-215, MCA (prohibiting illegal consideration for voting) and § 13-35-211, MCA (prohibiting certain electioneering activities at or near a polling place).

STATEMENT OF FINDINGS

Vance and Blossum allege that the delivery of food and water by Walseth and De Bode to the voters at the Gallatin County Courthouse constitutes the solicitation of votes for U.S. Senate candidate Jon Tester. They claim this conduct violated § 13-35-215, MCA, which provides in part:

Illegal consideration for voting. No person, directly or indirectly, by himself or by any other person in his behalf, may:

(1) before or during any election, for voting or agreeing to vote or for refraining or agreeing to refrain from voting at the election or for inducing another to do so:

(a) receive, agree, or contract for any money, gift, loan, liquor, valuable consideration, office, place, or employment for himself or any other person; or

(b) approach any candidate or agent or person representing or acting on behalf of any candidate and ask for or offer to agree or contract for any money, gift, loan, liquor, valuable consideration, office, place, or employment for himself or any other person;

...

§ 13-35-215, MCA does not apply to the activities alleged in the complaint. The statute prohibits a person from contracting for, receiving, or agreeing to receive any money, gift, liquor, valuable consideration, etc. in exchange for voting a particular way. In essence, the statute prohibits someone from selling their vote. The allegation in this case is not that a

voter attempted to sell his or her vote, but that Walseth and De Bode tried to buy votes with the offer of food and water.

Although not cited in the complaint, § 13-35-214(1), MCA prohibits a person from offering, promising, or giving another person any money, liquor, or valuable consideration to induce the person to vote or refrain from voting a particular way.

§ 13-35-214, MCA does not specify a penalty for violation of the statute. § 13-35-103, MCA states:

Violations as misdemeanor. A person who *knowingly* violates a provision of the election laws of this state for which no other penalty is specified is guilty of a misdemeanor. (Emphasis added).

§ 13-35-101(1), MCA provides that the “penalty provisions of the election laws of this state are intended to supplement and not to supersede the provisions of the Montana Criminal Code.” The Montana Criminal Code definition of the term “knowingly” is as follows:

"Knowingly"--a person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when the person is aware of the person's own conduct or that the circumstance exists. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when the person is aware that it is highly probable that the result will be caused by the person's conduct. When knowledge of the existence of a particular fact is an element of an offense, knowledge is established if a person is aware of a high probability of its existence. Equivalent terms, such as "knowing" or "with knowledge", have the same meaning.

The Montana Supreme Court has noted that in a criminal case mental state is “rarely susceptible of direct or positive proof, and therefore must usually be inferred from the facts testified to by witnesses and the circumstances as developed by the evidence.” (State v. Greenwell, 206 Mont. 233, 239, 670 P.2d 79, 82 (1983).) In a criminal case guilt must be proven beyond a reasonable doubt. (§ 46-16-204, MCA.)

There is insufficient evidence to establish beyond a reasonable doubt that Walseth and De Bode knowingly violated § 13-35-214, MCA by attempting to illegally influence voters through an offer of food and water. De Bode made an initial trip to the courthouse and distributed sandwiches, and there is no claim that during that trip she engaged in any improper conduct. After obtaining the permission of Vance and Blossum, De Bode and Walseth returned with additional food and water. Although they carelessly brought a tray of sandwiches into the courthouse with a plastic lid that contained Jon Tester campaign stickers, the evidence does not support a finding that their intent was to influence the voters by distributing food and beverages. It appears their primary intent was to provide food and

water to a number of people who had been waiting in line for a considerable amount of time to register and to vote.

The complaint also alleges that Walseth and De Bode engaged in conduct that violated § 13-35-211, MCA, which provides:

Electioneering -- soliciting information from electors. (1) A person may not do any electioneering on election day within any polling place or any building in which an election is being held or within 100 feet of any entrance to the building in which the polling place is located, which aids or promotes the success or defeat of any candidate or ballot issue to be voted upon at the election.

(2) A person may not buy, sell, give, wear, or display at or about the polls on an election day any badge, button, or other insignia which is designed or tends to aid or promote the success or defeat of any candidate or ballot issue to be voted upon at the election.

(3) A person within a polling place or any building in which an election is being held may not solicit from an elector, before or after the elector has marked a ballot and returned it to an election judge, information as to whether the elector intends to vote or has voted for or against a candidate or ballot issue.

The Commissioner has adopted ARM 44.10.311 to implement the terms of § 13-35-211, MCA:

ELECTIONEERING - INTERPRETIVE RULE (1) As used in 13-35-211, MCA, "electioneering" means the solicitation of support or opposition to a candidate or issue to be voted upon at the election or polling place in question, by means of:

(a) Personal persuasion, electronic amplification of the human voice, or the display or distribution of campaign materials.

(b) Offering or distribution of food, drink, or any other material benefit in a manner calculated to encourage recognition, support, or opposition to a candidate or issue.

(c) "Electioneering" does not include the display of ordinary bumper stickers on automobiles.

Like § 13-35-214, MCA, the electioneering statute does not contain a penalty provision; therefore to establish a violation it would be necessary to prove beyond a reasonable doubt that a person knowingly violated the statute. (§ 13-35-103, MCA.)

I find there is insufficient evidence to prove that Walseth and De Bode violated § 13-35-211, MCA. Reading the statute and rule together, it is apparent that proof of a violation requires evidence that a person, within or near a polling place, solicited support for or opposition to a candidate or ballot issue by means of 1) personal persuasion, electronic amplification of the human voice, or display of campaign materials; or 2) distribution of food, drink, or other material benefit "in a manner calculated to encourage recognition, support, or opposition to a candidate or issue." (ARM 44.10.311(1)(a) and (1)(b).)

According to Walseth and De Bode, the tray lid with the Jon Tester stickers was confiscated in the entryway to the building. Walseth and De Bode were then permitted to distribute the sandwiches and water. There are no allegations that they identified themselves as Democrats or engaged in any verbal or nonverbal conduct that could be construed as solicitation of votes.

They clearly exercised poor judgment when they brought the sandwich tray lid containing campaign stickers into the building. I find, however, that their actions did not rise to the level of a knowing violation of the electioneering statute. It does not appear that their intent was to display campaign materials or to use other means to solicit votes for Jon Tester. Again, their primary intent was to provide food and water to the voters.

Although I have found insufficient evidence that Walseth and De Bode violated the statutes, it is important to emphasize that Vance and Blossum were justifiably concerned when they realized that campaign materials had been brought into the courthouse. The legislature has enacted laws providing that polling places and adjacent areas are intended to be “campaign-free” zones. Vance and Blossum acted appropriately when they seized the lid with the campaign stickers, because their objective as election officials was to ensure the integrity of the electoral process by enforcing the restrictions and prohibitions of the statute. (See *Burson v. Freeman*, 504 U.S. 191 (1992).)

CONCLUSION

Based on the preceding Summary of Facts and Statement of Findings there is insufficient evidence to conclude that Jim Walseth and Debra De Bode violated Montana campaign finance and practices laws.

Dated this 23rd day of February, 2009.



Dennis Unsworth
Commissioner